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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-152

In re Christina I. CONNORS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of Florida, entered herein on May 5, 1976, sustaining the ruling of the Circuit Court in and for Pasco County. That ruling declared that Chapter 394.467(3)(b), Florida Statutes (hereinafter F.S.), as amended by Chapter 74-233, Laws of Florida (hereinafter cited as Ch. 74-233), is in conflict with the Florida Rule of Criminal Procedure 3.460 (hereinafter cited

as F.R.Cr.P. 3.460) and that, pursuant to Article V, Section 2, Constitution of Florida, the Rule supercedes the statute. That ruling also stated that F.R.Cr.P. 3.460 does not conflict with the equal protection or due process clauses of the Fourteenth Amendment to the United States Constitution.

Opinion Below

The order of the court below relied on *Powell v. Genung*, 306 So.2d 113 (Fla. Sup. Ct. 1974), appended hereto, *infra* p.C1, to dispose of the United States constitutional questions raised in this case.

Jurisdiction

The final order of the Florida Supreme Court, *In re Christina I. Connors*, 332 So.2d 336 (Fla. Sup. Ct. 1976), was made and entered on May 5, 1976, and is appended

hereto, *infra* at p. B1. The jurisdiction of the Court is invoked under 28 U.S.C. §1257 (3).

Questions Presented

1. May the State Judiciary under the Fourteenth Amendment to the United States Constitution, involuntarily and indefinitely commit to a mental health treatment facility an acquittee by reason of insanity

(a) under a standard and via a procedure different from those applied to involuntary commitments of all other persons, including persons convicted and under sentence and persons with criminal record;

(b) via a court procedural rule which on its face, and as applied, does not guarantee the acquittee minimum due process standards?

2. Does the indefinite confinement of an acquittee by reason of insanity, solely on the authority of a rule of criminal "procedure", violate the United States Constitution's guarantee to due process of "law" under the Fourteenth Amendment or violate the United States Constitution's guarantee of a republican form of government under Article IV, Section 4?

Constitutional, Statutory, and Regulatory Provisions Involved

The principal constitutional provisions involved are Article IV, Section 4, of the United States Constitution and the Fourteenth Amendment to the United States Constitution, both *infra* p. A1, appendix, and Article V, Section 2(a) of the Florida Constitution, *infra* p. 7-8. F.R.Cr.P. 3.460, entitled "Acquittal for Cause of Insanity",

is presented *below*. See §394.451 through 394.478, F.S., (hereinafter cited as the Florida Mental Health Act). Chapter 74-233, Section 3, Laws of Florida, which amended §394.467(3)(b) of the Florida Mental Health Act is set forth, *infra* p. 7.

Statement of the Case

Christina I. Connors was acquitted of her criminal charges by reason of insanity and was ordered directly committed to a state mental health treatment facility by her Sixth Judicial Circuit criminal trial judge. The judge committed her pursuant to F.R.Cr.P. 3.460 which provides:

> When a person tried for an offense shall be acquitted for the cause of insanity, the jury, in giving their verdict of not guilty , shall state that it was given for such cause. If the

discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person and such person shall be held in custody until released by order of the committing court, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person; otherwise he shall be discharged.
Amended and effective Jan. 16, 1974 (287 So.2d 678).

The Director of the Florida Division of Mental Health refused to admit Connors to a state mental health treatment facility because the defendant had not been committed according to the ordinary civil procedure outlined in the Florida Mental Health Act, i.e., Part I, Chapter 394, F.S. On December, 6, 1974, the trial judge entered an order for the Director to show cause why he should not be found in contempt of court

for not admitting Connors. The Director argued that the civil procedure was mandated by Ch. 74-233, Section 3, Laws of Florida which amended Chapter 394.467(3)(b), F.S. to read:

> Any person adjudicated not guilty by reason of insanity pursuant to Florida Rules of Criminal Procedure 3.460 shall be committed to the division for hospitalization and treatment in accordance with the provisions of Part I of this Chapter.

On December 20, 1974, the trial judge entered a supplemental commitment order which, in effect, declared that Ch. 74-233 was in conflict with F.R.Cr.P. 3.460 and that F.R.Cr.P. 3.460 had not been repealed pursuant to Article V, Section 2(a), of the Florida Constitution which provides:

> The Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all court, the transfer to the court having jurisdiction of any proceeding when

> the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two thirds vote of the membership of each house of the legislature. (emphasis added)

The trial judge thus ruled that the part of Ch. 74-233 which related to F.R.Cr.P. 3.460 was unconstitutional or otherwise ineffective for all acquittees under F.R.Cr.P. 3.460.

Petitioner, Florida Department of Health and Rehabilitative Services, filed a Notice of Appeal on January 15, 1975, as a direct appeal to the Florida Supreme Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution. On May 5, 1976, the Florida Supreme Court, relying on *Powell v. Genung*, 306 So.2d 113 (Fla. Sup. Ct. 1974), *infra* pp. C1, appendix, reiterated that involuntary

commitment of an acquittee by reason of insanity is procedural, not substantive in nature, and therefore properly within the purview of its Rules of Criminal Procedure. The Florida Supreme Court concurred with the trial court that the Legislature had not repealed F.R.Cr.P. 3.460, that Ch. 74-233 attempted to derogate the authority of the committing judge set out by F.R.Cr.P. 3.460, and that the statutory provision was superceded by F.R.Cr.P. 3.460. Finally, the Florida Supreme Court concurred with the lower court that:

> "to the extent that §394.467(3)(b), F.S. attempts to derogate the authority of the committing judge set out by F.R.Cr.P. 3.460, such statutory provision is superceded thereby."

The Florida Supreme Court rejected Petitioner's federal constitutional arguments that F.R.Cr.P. 3.460 violates the due process and equal protection clauses

of the Fourteenth Amendment to the United States Constitution.

Reasons Relied on for the Allowance of the Writ

1.(a) This case presents squarely the issue of the right of the state judiciary, under the Fourteenth Amendment, to involuntarily and indefinitely commit an acquittee by reason of insanity to a mental health treatment facility under a standard and via a procedure different from those applied to involuntary commitments of all other persons, including persons convicted and under sentence and persons with criminal records.

This court has already declared that a person who is serving time for a criminal offense and who is nearing the end of his sentence must be accorded

procedural and substantive protection against indefinite commitment equal to that generally available to all others. *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). In *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435, 442 (1972), this court declared that "the 'Baxstrom' principle also has been extended to commitment following an insanity acquittal."

Direct commitment of an acquittee by reason of insanity by the court of criminal jurisdiction pursuant to F.R.Cr.P. 3.460 rather than pursuant to the Florida Mental Health Act, denies to the acquittee the following substantive and procedural rights available to all other persons:

(1) Under F.R.Cr.P. 3.460 the Court is only required to find that the defendant is "manifestly dangerous", but not necessarily mentally ill, a prerequisite for commitment of civil patients, correctional clients, and clients with criminal records. Although equal protection does not require that all persons be dealt with identically, it does require that the distinction made have some relevance to the purpose for which the classification is made. U.S.C.A. Const. Amend. 14. This court has addressed in *Baxstrom supra* p. 11, the rationale for using dangerousness as a basis for distinguishing commitment procedures.

> "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the

> type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all." at 111.

Were the statute rather than the Rule held to be constitutional, use of dangerousness of an acquittee as a basis for following a different procedure for involuntary commitment has no relevance. §394.459(1), F.S., provides for use of jails as emergency facilities to protect the patients or others, for five (5) days, or forty-five (45) days in felony criminal cases. Thus, if a client is actually "manifestly dangerous" he can be maintained in a secure setting and still be civilly committed via the procedure followed for all other involuntarily committed clients.

(2) All civil clients, clients under correctional custody, and all clients with criminal records must be examined personally within five (5) days of the date of the petition for involuntary hospitalization by two physicians. They must concur with the local mental health receiving facility administrator that the client meets the criteria for involuntary hospitalization of Ch. 394.467(1), F.S. F.R.Cr.P. 3.460 contains no such requirement.

(3) The court is under no time limitation in which to hold a hearing for involuntary hospitalization under F.R.Cr.P. 3.460. The civil patient must, however, be examined by a receiving facility and an order for involuntary hospitalization filed within 48 hours of an emergency admission,

§394.463(1)(d), F.S., or within five (5) days for a court or a court ordered evaluation, § 394.463 (2)(e), F.S. Further, once a petition is filed, the court must hold the hearing for involuntary hospitalization within five (5) days unless a continuance is granted, §394.467(3)(a),F.S.

(4) Unless it is determined that the acquittee is mentally ill, he will be denied the right to treatment available to all other mental health clients. Ch. 394.459(4)(a), F.S., provides that:

> "each patient in a facility shall receive treatment suited to his needs--Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community."

If the acquittee is committed as dangerous and not mentally ill, the state can not provide treatment because mental health treatment is directed toward the dangerous but mentally ill and not solely dangerous clients.

(5) The decision by the Florida courts that Ch. 74-233 is unconstitutional and that involuntary commitment of acquittees by reason of insanity must proceed under F.R.Cr.P. 3.460 also creates a disparity in the availability to the right to hearings for continued involuntary hospitalization. The remainder of §394.467(3)(b),F.S., which was notdeclared unconstitutional provides that all civil patients and patients committed pursuant to Ch. 801 and 917, F.S. (convicted Child Molesters

and Mentally Disordered Sex Offenders), and F.R.Cr.P. 3.210 clients (incompetent to stand trial) have a right to hearings to determine if they need continued hospitalization within six (6) months of admission to a treatment facility and at least every year thereafter. F.R.Cr.P. 3.460 provides no mandatory requirement for any further hearings for continued involuntary hospitalization of acquittees by reason of insanity. (See "Reasons Relied on for the Allowance of the Writ," infra, p.23 , for due process ramifications).

(6) A civil involuntary client, even if he has a criminal record, may request to be changed to voluntary status unless he is under current criminal charge, §394.465(2),F.S.;

or the administrator of a treatment facility may discharge without concurrence of the committing court any civilly involuntarily committed client not under current criminal charges, §394.469, F.S. An acquittee by reason of insanity is no longer under criminal charge. Yet, his release under §394.467(5)(b), F.S., can be initiated only by the administrator of the treatment facility. That release procedure requires notice to the State Attorney from the committing county, a hearing before the state hearing examiner who can only make a recommendation to the committing court for release of the patient, and ultimately a jury trial to determine if the client continues to meet the criteria for involuntary

hospitalization if the committing court will not grant the acquittee's release.

(b) This case also presents squarely the issue of whether a state can involuntarily and indefinitely commit to a mental health treatment facility an acquittee by reason of insanity via a court procedural rule which on its face, and as applied, does not guarantee the acquittee minimum due process standards applicable to the States under the Fourteenth Amendment.

It is a fundamental constitutional principle that a state may not deprive a person of his liberty without due process of law. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 28, L. Ed. 2d 113, (1971)*Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 33 L. Ed. 2d 484 (1973) .

In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, (1967) This principle has been applied to the commitment of the mentally ill. *Lynch v. Barley,* 386 F. Supp. 378 (M.D. Ala., N.D. 1974) and *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wisc. 1972).

F.R.Cr.P. 3.460 is defective on its face because none of the following constitutional due process rights are guaranteed or granted by the Rule: notice, the opportunity to be heard, the right to counsel, a standard of proof, the right to confront and cross examine witnesses, the opportunity to present evidence, the right to a present test to determine the presence or absence of mental illness, or the right to periodic review for continued involuntary hospitalization.

(1) In particular, for an acquittee by reason of insanity, a procedure

which mandates a "present" determination of the presence or absence of "mental illness" takes on added importance. Under Florida law,

> "where an accused has raised a reasonable doubt as to his sanity at the time of the offense--the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt." 9 Fla.Jur. § 43, pp. 67-68.

In other words, for an acquittee by reason of insanity, the prosecution did not prove beyond a reasonable doubt that the defendant was "sane" at the time of the offense. It was not proven under any standard that the acquittee was "insane." Therefore, since there is no presumption of insanity generally, 17 Fla. Jur. § 60, p. 497, since no presumption of continued insanity arises anyway from temporary

insanity, 13 Fla. Jur. § 88, p. 94; *Armstrong v. State*, 30 Fla. 170, 11 So. 618, 17 L.R.A. 484 (1892), and since the acquittee was competent to stand trial and to make the insanity plea, it is essential that the acquittee by reason of insanity be accorded a present hearing to determine by the "preponderance of the evidence," the applicable Florida standard, that he is mentally ill. 17 Fla. Jur. § 61, p. 498; *Kuehmsted v. Turnwall*, 115 Fla. 692, 115 So. 847 (1934).

(2) A finding of dangerousness, which on the face of F.R. Cr.P. 3.460 is the only determination a court must make to indefinitely commit an acquittee by reason of insanity, does not equate with a finding of mental

illness. (See "Reasons Relied on for the Allowance of the Writ" p. 12, *supra.*) In fact, the Florida Supreme Court opinion does not even address the issue of the presence or absence of mental illness:

> A determination by the trial judge that one found not guilty by reason of insanity is manifestly dangerous to the community <u>presupposes</u> (emphasis added) the trial judge <u>means</u> (emphasis added) that the defendant is manifestly dangerous, *at the time of commitment*--- Opinion, p. B9, Appendix.

But, note--<u>not mentally ill</u>!

(3) Furthermore, F.R.Cr.P. 3.460 does not require periodic review of the need to continue involuntary hospitalization of an acquittee by reason of insanity. Hearings are granted only at the discretion of the committing circuit court judge. The Florida Supreme Court states in its

opinion, p. B12, appendix,

> We have no reason to believe that the trial judges of this state would not respond to a request for a current re-examination and redetermination of the defendant-patient's mental condition at least within a period not to exceed six (6) months; and if further hospitalization is found to be necessary, thereafter, requests may be made for re-examination at reasonably separated periodic intervals or at the suggestion of the custodial official. *Powell v. Genung, supra,* Ch. 75-305, Laws of Florida, 1975.

It is submitted to this Court that a request for hearing does not equate with the right to a hearing at required intervals as opposed to "reasonably separated periodic intervals." The involuntary commitment of an acquittee by reason of insanity under F.R.Cr.P. 3.460 could quite easily lead to permanent as opposed to indefinite commitment of such client.

2. This case presents the issue whether the indefinite confinement of an acquittee by reason of insanity solely on authority of a Rule of Criminal Procedure violates the Constitutional guarantee to due process of law under the Fourteenth Amendment or violates the Constitution's guarantee of a Republican form of government under Article IV, Section 4.

The thrust of the argument is that even where the terms of the criminal procedure rule in question do meet the dictates of due process, such rule is invalid because it is beyond the jurisdiction of the Court to enact. It is submitted that the enactment of a substantive rule of law by a Court is comparable to an enactment of such provision by an incorporated

vigilante organization; neither has any more power than the other to enact legislation. In Florida, as in States in general, a federal defendant who is found not guilty by reason of insanity leaves the courtroom without legal restraint. (In the District of Columbia, see *Lynch v. Overholser*, 8 Law Ed 2d, 211,--In states other than Florida, statutes rather than procedural rules control the confinement of acquittees by reason of insanity.) Clearly if a local vigilante committee enacted in its by-laws that those acquitted as insane would be confined as long as dangerous, this Court would invalidate the procedure, no matter how reasonable the terms of the corporate by-laws might be if appropriately enacted by legislative authority. Likewise, if a Court

having no legislative power undertakes to enact a substantive rule of law, such enactment must be stricken as invalid without consideration of the reasonableness of its provisions. In the case of *Washington-Southern Navigation Company v. Boltman and Valley Steamboat Company*, 68 Law Ed. 480, 263 U.S. 629, this Court stated "But no rule of Court can enlarge or restrict jurisdiction, nor can a rule abrogate or modify substantive law." In *Youngstown Sheet & Tube Company v. Sawyer*, 96 Law Ed 1153, 343 U.S. 580, this Court held that an attempt by a President to enact substantive law in the guise of an executive order in order to authorize a Federal take over of steel companies was invalid as being beyond the jurisdiction of the President.

There is little doubt that the term "criminally insane" creates a substantial fear in the public and a firm emotional base for the judiciary to strengthen legislative enactment through substantive enactments in the guise of procedural rules. The same emotion has created vigilante activity in general. It is submitted that a substantive law enactment by a Court has no more validity than if such enactment had been by a private group. Neither the Court nor the private group has the jurisdiction necessary to give the enactment efficacy.

Related to this argument is the concept that legislative enactments by Courts violate the Constitutional guarantee of the republican form of Government provided by Article IV,

Section 4, of the United States Constitution. Thus, in the case of *South Carolina v. United States*, 199 U.S. 454, 50 Law Ed. 261, this Court defined a Republican form of Government as guaranteeing to the people the passage of laws in virtue of the legislative power reposed in representative bodies. While the Court in such case determined that the question of the Republican form of Government was nonjusticiable, the Court more recently, in affirming *Kohler v. Tugwell*, 393 U.S. 531, 21 Law Ed. 2d 755, held that the question of Republican form of Government is justiciable.

In summary, it is suggested that while a Court may arguably, in the name of procedure, pass rules controlling the handling of insane persons during pendency of the trial, it cannot, in

the name of procedure, control the liberty of the acquitted. Confinement of the acquitted involves substantive law which must be controlled by the legislative body.

Conclusion

Since F.R.Cr.P. 3.460 applies to all acquittees by reason of insanity who are manifestly dangerous and because involuntary commitments of the acquittees, solely pursuant to the authority of a Court procedural Rule, raise important constitutional questions, the petition for a writ of certiorari should be granted.

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APPENDIX

ARTICLE IV, SECTION 4
UNITED STATES CONSTITUTION

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

AMENDMENT XIV, SECTION 1
UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257 (3)

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

In re Christina I. CONNORS.
Cite as, Fla., 332 So.2d 336
No. 46799.

Supreme Court of Florida.

May 5, 1976.

A direct appeal was taken from a final order of the Circuit Court in and for Pasco County, Lawrence E. Keough, J., passing upon the constitutional validity of statutory provision pertaining to the commitability of persons to the division of mental health of the Department of Health and Rehabilitative Services. The Supreme Court, Roberts, J., held that to the extent statute, providing in part that "Any person adjudicated not guilty by reason of insanity pursuant to Rule 3.460 of the Florida Rules of Criminal Procedure shall be committed to the division for hospitalization and treatment in accordance with the provisions of this part," attempts to derogate the authority of the committing judge set out in Rule 3.460, such statutory provision is superseded thereby.

Affirmed.

Hatchett, J., dissented with opinion.

England, J., dissented.

1. Mental Health 439

A determination by the trial judge that one found not guilty by reason of insanity is manifestly dangerous to the community

presupposes that the trial judge means that the defendant is manifestly dangerous "at the time of commitment," because the jury verdict or adjudication by the trial judge of not guilty of the crime charged by reason of insanity relates to his or her mental condition at the time of the commission of the crime which could have occurred many months or even years before the adjudication. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.460.

2. Constitutional Law 255(5)

Where defendant, immediately following her adjudication of not guilty by reason of insanity, was given a hearing to determine her mental condition and the danger posed thereby to the community at the present time, and where, at the hearing, defense counsel was present and both sides stipulated to doctors' reports, the procedure followed accorded defendant all necessary due process rights. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.460.

3. Mental Health 433

To the extent statute, providing in part that "Any person adjudicated not guilty by reason of insanity pursuant to Rule 3.460 of the Florida Rules of Criminal Procedure shall be committed to the division for hospitalization and treatment in accordance with the provisions of this part," attempts to derogate the authority of the committing judge set out in Rule 3.460, such statutory provision is superseded

thereby. West's F.S.A. § 394.467(3)(b); 34 West's F.S.A. Rules of Criminal Procedure, rule 3.460.

Eric Haugdahl, Jacksonville, and James G. Mahorner, Tallahassee, for appellant.

James T. Russell, State's Atty., and George E. Tragos, Asst. State's Atty., for appellee.

ROBERTS, Justice.

This cause is before us on direct appeal from a final order of the Circuit Court, Sixth Judicial Circuit, which passes upon the constitutional validity of Section 394.467(3)(b), Florida Statutes.[1] We have

1. Section 394.467(3)(b) [Chapter 74-233], provides:

> "(b) In the event a person is ordered into a treatment facility under the provisions of the Florida Rules of Criminal Procedure or chapter 801 or chapter 917, the order shall adequately document the nature and extent of a patient's mental illness. Any person adjudicated not guilty by reason of insanity pursuant to Rule 3.460 of the Florida Rules of Criminal Procedure shall be committed to the division for hospitalization and treatment in accordance with the provisions of this part. No person charged with a misdemeanor shall be committed to the division solely by Rule 3.210 of the Florida Rules of Criminal Procedure, but

jurisdiction pursuant to Article V, Section 3(b)(1), Constitution of Florida.

Pertinent to the determination of this cause are the following facts. Dr. Stuart Cahoon, Director of the Division of Mental Health, refused to admit Christina I. Connors to the State of Florida mental health facilities after her acquittal by reason of insanity and the subsequent Order of Commitment issued on December 2, 1974, by

> shall be admitted for hospitalization and treatment in accordance with the privisions of this part. The treatment facility may accept and retain a patient so admitted for a period not to exceed six months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient and document the results of any criminal investigation on the patient. If a patient is considered to be suffering from an emotional illness to the extent that he cannot participate in his own defense, such documentation should include details regarding the evaluation which led to that conclusion. If further hospitalization is necessary at the end of his authorized treatment period, the administrator shall apply to the hearing examiner for an order authorizing continued hospitalization."

Circuit Judge Lawrence E. Keough of the Sixth Judicial Circuit pursuant to Criminal Rule 3.460. In the Order of Commitment, Judge Keough explained that the discharge of the defendant would be mainfestly dangerous to the peace and safety of the people with whom defendant might come in contact with. On December 6, 1974, Judge Keough entered an Order to Show Cause directed to the Director of the Division of Mental Health to show why he should not be held in contempt of court for failure to comply with the judgment of acquittal by reason of insanity and Order of Commitment. In a Supplemental Commitment entered December 20, 1974, Judge Keough stated:

> "This cause coming on to be heard upon the Order to Show Cause heretofore entered by this Court on December 6, 1974, and upon the Motion to Dismiss Order to Show Cause filed by Dr. Stuart Cahoon and having been made to appear that Dr Stuart Cahoon as Director of the Division of Mental Health, Department of Health and Rehabilitative Services is willing and anxious to carry out and fulfill his official obligations as Director and that because of the language contained in Florida Statute 394.467(3)(b), as amended, he believes that, notwithstanding Florida Rule of Criminal Procedure 3.460, the defendant, Christina I.

Connors, is not commitable to the Division of Mental Health of the Department of Health and Rehabilitative Services unless she is also civilly committed pursuant to Part I of Chapter 394 of the Florida Statutes; that this Court, pursuant to Rule 3.460 and as evidenced by this Court's Judgment of December 2, 1974, has found that the discharge of the defendant would be manifestly dangerous to the peace and safety of the people with whom defendant might come in contact and intended that the defendant be forthwith committed to the Division of Mental Health for hospitalization and treatment in accordance with Rule 3.460 and that she not undergo further civil commitment procedures as set forth in Part I of Chapter 394; it further having been made to appear that the refusal of the Division of Mental Health of the Department of Health and Rehabilitative Services to admit the defendant subsequent to December 2, 1974, although believed by the director to be justified, has caused the defendant unintended and additional incarceration in the Pasco County Detention Center where she has been a nuisance and danger to herself and others and that continuation of the status quo cannot be further tolerated by the Court."

proceeded to find:

"1. That the provisions of Florida Statute 394.467(3)(b) relating to Part

I, Chapter 394 are unconstitutional or otherwise ineffective as applied to this defendant and others who are committed to the Division of Mental Health of the Department of Health and Rehabilitative Services by Court Order pursuant to Rule 3.460 after having been acquitted by reason of insanity and a finding made by the Court that defendant's discharge or going at large would be manifestly dangerous to the peace and safety of the people.

"2. That under these circumstances, the above finding appears to be more appropriate at this time than a continuation of contempt proceedings against Dr. Stuart Cahoon."

and ordered that:

"1. That Florida Statute 394.467(3)(b) is unconstitutional or otherwise ineffective and inoperative as applied to the defendant, Christina I. Connors, and all other defendants in like circumstances.

"2. That Dr. Stuart Cahoon, as Director of the Division of Mental Health of the Department of Health and Rehabilitative Services, admit the defendant, Christina I. Connors, for hospitalization and treatment within ten (10) days from the date hereof and that other defendants likewise be admitted in the future forthwith and without the occurence of civil commitment proceedings who by

> Court Order are committed to the Division of Mental Health pursuant to Rule 3.460 upon Court findings that such person's discharge or going at large shall be manifestly dangerous to the peace and safety of the people."

Sub judice, Judge Keough's determination of the present mental state of Connors as posing a dangerous threat to the peace and safety of the people was made separately from the judgment of not guilty by reason of insanity.

We agree with the reasoning and conclusions of the trial court under review and find that Judge Keough acted properly pursuant to Rule 3.460, Florida Rules of Criminal Procedure, in ordering that Christina I. Connors be committed after a determination of her mental state at the time of his Order of Commitment. Rule 3.460, Florida Rules of Criminal Procedure, provides:

> "When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause. If the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person and such person shall

> be held in custody until released by order of the committing court, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person; otherwise he shall be discharged."

[1] A determination by the trial judge that one found not guilty by reason of insanity is manifestly dangerous to the community presupposes that the trial judge means that the defendant is manifestly dangerous *at the time of commitment*, because the jury verdict or adjudication by the trial judge of not gulity of the crime charged by reason of insanity relates to his mental condition at the time of commission of the crime which could have occurred many months or even years before the adjudication.

Section 394.467(3)(b), Florida Statutes, does not purport to veto or repeal Rule 3.460, F.Cr.R.P., as contemplated by Article V, Section 2, Constitution of Florida. Cf. *In Re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204 (Fla.1973). Relative to appellant's argument that the statute supersedes the rule because of the substantive nature of the matter dealt with therein, this Court stated in *Powell v. Genung*, 306 So.2d 113 (Fla. 1974), at 115-116:

> "This rule is substantially identical to Section 919.11, Florida Statutes,

the statutory precursor of Rule 3.460, which statutory provision was repealed by the Legislature by Chapter 70-339, Laws of Florida, as having been superceded by the Rules of Criminal Procedure. Section 919.11, F.S., had been interpreted by the courts of this state to allow continuing jurisdiction over petitioner in the trial court to determine by subsequent hearing and order whether defendant was still manifestly dangerous to the public. *State v. Eaton*, 161 So.2d 549 (Fla.App.1964), *Oksten v. State*, 173 So.2d 489 (Fla.App.1965) cert. den. 177 So.2d 11 (Fla.1965), U.S. cert. den. 382 U.S. 867, 86 S.Ct. 138, 15 L.Ed.2d 105."

The instant cause is controlled by our decision in *Powell v. Genung, supra.*[2] The material questions of law argued, sub judice, were discussed and disposed of in that decision and it would serve no useful purpose to repeat that discussion here.

In support of her position that Rule 3.460 does not provide the proper constitutional safeguards, appellant cites *Baxstrom v. Herold,*

2. In 1975, the Legislature of the State of Florida adopted Ch. 75-305 which added paragraph (h) to Section 394.467(4), Florida Statutes, to accord with *Powell v. Genung, supra.*

383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972), and *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). This Court in response to the same assertions by petitioner in *Powell v. Genung, supra,* opined:

> "The committing court granted this full hearing whereat petitioner was represented by counsel, and at the conclusion of which the trial judge properly determined that petitioner continues at the present time to pose a danger to others. See *Oksten v. State,*[3] *supra,* and *State v. Eaton, supra.*

3. We are not unmindful of the decisions of the Supreme Court in *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), *Specht v. Patterson,* 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), *Humphrey v. Cady,* 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972), and *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), with which the instant decision is clearly consistent. Those decisions deal with the right to a hearing before commitment to a mental hospital."

[2] Sub judice, defendant was given a hearing immediately following her adjudication of not guilty by reason of insanity to determine her mental condition and the danger posed thereby to the community at this time. At this hearing, defense counsel was present and both sides

stipulated to the doctors' reports.

The procedure set out by Rule 3.460, F.Cr.R.P., and that followed by the trial court below accord with the above-cited cases from the Supreme Court of the United States. Accord also: *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 decided June 26, 1975.

We are not unmindful that these decisions hold that such patients are not subject to the same periodic re-examinations as are those committed who have not been charged with criminal offense. Cf. Section 394.467(3)(a), Florida Statutes (1973), Ch. 75-305, Laws of Florida, 1975. However, we have no reason to believe that the trial judges of this State would not respond to a request for a current re-examination and redetermination of the defendant-patient's mental condition at least within a period not to exceed six months; and, if further hospitalization is found to be necessary, thereafter, requests may be made for re-examination at reasonably separated periodic intervals or on the suggestion of the custodial official. *Powell v. Genung, supra*, Ch. 75-305, Laws of Florida, 1975. However, should such an unexpected denial occur, appropriate remedies are available under the law of this State. The Court now has under consideration an amendment to the present rule which would facilitate such periodic re-examinations.

Appellee argues and we agree that Connors has been accorded all necessary due

process rights by the trial court including a hearing and determination by the trial court that she is presently manifestly dangerous to the peace and safety of the people.

[3] Accordingly, the trial court acted in accordance with Rule 3.460, F.Cr.R.P., in requiring that Connors be committed because she is manifestly dangerous to the peace and safety of the people at the present time. To the extent that Section 394.467(3)(b), Florida Statutes, attempts to derogate the authority of the committing judge set out in Rule 3.460, F.Cr.R.P. such statutory provision is superseded thereby.

For the aforestated reasons, the judgment of the trial judge is affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD and SUNDBERG, JJ., concur.

HATCHETT, J., dissents with opinion.

ENGLAND, J., dissents.

HATCHETT, Justice (dissenting).

In my opinion, no case or controversy is ripe for decision here. This case began as an ordinary prosecution of a citizen accused of crimes against property,

but reaches us in a highly unusual procedural posture. Without doubting the importance of the question presented, I believe the Court oversteps jurisdictional boundaries in reaching the merits. While expressing the view that the legislature disregarded state consitutional limitations by enacting Fla.Stat. § 394.467(3)(b) (1974 Supp.), as amended, the Court fails to observe state constitutional restrictions on its own power, in my view. Accordingly, I respectfully dissent from the judgment of the Court.

A chronology of the case reveals that the accused has dropped out of the proceedings and that only an abstract question remains in her stead. On July 19, 1974, an information was filed accusing Mrs. Christina Irene Connors[1] of stealing a certain automobile. Mrs. Connors had earlier been arrested on this charge and was ordered released pending trial on "personal surety" bond. Because of an unrelated incident, on September 19, 1974, Mrs. Connors was taken by the police to the psychiatric ward of a general hospital, where she was placed under the care of a physician. She was discharged on September 24, 1974, "since there was nothing to justify committing her."

1. Defense counsel represented to the trial court that Christina Welch and Christina Irene Connors are one and the same person.

Defense counsel filed a motion for sanity inquisition on October 29, 1974, asking that the court appoint experts to examine his client as to her "mental condition and sanity at the time of the alleged offenses . . . and as to her present capacity to stand trial." Attached to this motion were a "psychiatric history", a "psychiatric evaluation" and a "discharge summary". These documents are set forth in pertinent part in the margin.[2]

2. PSYCHIATRIC HISTORY
Admitted 9-19-74
CHIEF COMPLAINT: This grossly obese white female was brought here by the police. Apparently she was intoxicated and was behaving in a very destructive manner, breaking windows, screaming and hollering, and was unable to account for herself. When brought to the hospital she was uncooperative and did not comprehend why she was here at all, but the next day she complained that she was brought here under false pretext, that there was nothing wrong with her, she was only having an argument with her boyfriend, and the police are exaggerating and had beaten her up and have been against her all of the time. Obviously the patient has no recollection of what happened prior to the admission or she is minimizing the problems.
PRESENT ILLNESS: The present illness was precipitated by an argument with her boyfriend, with whom she has been living for the past two months. She claims that she was moderately drunk but does not admit that she was disturbed in any way and feels that she does not need to be here at all, and there are

Note 2-Continued

charges framed against her by the police, who just want to harass her. At the same time she admits that she has had some psychiatric problems in the past and had been in the following program in Andover, New Jersey but she has not been following through regularly.

PAST HISTORY: The patient has had a psychiatric hospitalization in Andover State Hospital in New Jersey but prior to that she claims that she has had no problem other than gross overweight, for which she finds no reason. She claims she does not eat too much, but in spite of that, her weight problem has been trememdous.

MEDICAL HISTORY: The patient gives no history of previous illnesses or operations other than the obesity. She has had one child, who is now age 7, who lives with her parents, has had no other serious illnesses or operations.

INVENTORY OF SYSTEM: She claims that she has irregular vaginal bleeding. There is no evidence of dizziness, convulsions, etc. GI system is negative. Respiratory system negative.

SOCIAL HISTORY: Apparently the patient is the second child in the family and she was always close to the family and did not really make anything on her own. When her mother divorced her father, she was rather upset and started living on her own. At this time she said she got married to a boy and the marriage lasted for a short time. She has a child by this marriage. She is unable to take care of this child and he is now living in a foster home in New Jersey and she came here to Florida to plan moving here to her mother's. Her mother now is remarried and the patient claims that since the mother has remarried, she has been upset and this is why she had to "shack-up" with her present boyfriend with whom she does not get along. The patient does not seem to have a satisfactory work history.

FAMILY HISTORY: As mentioned above, she only has a mother and a sister with whom she has no

Note 2-Continued

contact. Her husband is dead and she has a son six years old who lives in a foster home.

PSYCHIATRIC EVALUATION

MENTAL STATUS EXAMINATION: This fairly obese 28-year old white female appears to be rather agitated and restless, and wants to be released here on demand, and she claims there is nothing wrong with her, etc. Her speech is relevant and coherent, but very guarded and does not really elaborate on many things which are unexplainable. Obviously it seems to me that the patient has difficulty trusting people and avoids direct eye contact. I feel that the patient is rather paranoid but knows how to cover up fairly well. She denies any hallucinations, no delusions could be elicited except that everybody is against her and the police are framing charges on her, etc. She claims that most of the things that the police say that she said were framed up to keep her here, which seems to me to be a paranoid delusion rather than her trying to minimize her symptoms. She obviously minimizes and denies that she is ill at all, and has very poor insight into her problem and very poor judgment. She is oriented in all spheres. She appears to be functioning at a border-line level of intelligence and appears to have a very poor impulse control and rather immature for her age and she has a lot of dependency needs, especially on her mother, and it seems that the present episode might have been precipitated by the fact that the mother has remarried.

PSYCHODYNAMICS AND SOCIODYNAMICS: I think the patient is rather immature and has poor impulse

Note 2-Continued
controls, is at the same time dependent on her mother, has a poor work history, etc., which suggests that she is a dependent personality and has difficulty in inter-personal relationships, with the result that any trauma precipitates a psychotic attack. The present one was probably precipitated by her being separated from her mother because of the mother's remarriage, which she could not face. She does not seem to have any sustained interest in any job situation or anywhere, has lived on welfare, and has not satisfactorily done any work in the past.
PRECIPITATING STRESS AND PREMORBID PERSONALITY: As mentioned above, I think the separation from her mother due her marriage and separation from her son due to her inability to take care of him, have both been working on her and this has built her up into a state of paranoid delusion because everybody is against her because things are not going exactly as she plans. The patient has no strength to really do anything on her own without some direction.
TENTATIVE DIAGNOSIS: I think the patient is a paranoid schizophrenic who is well able to cover up her symptomology and I think the alcoholic intoxication precipitated the acute psychotic episode.
PROGNOSIS: Guarded.
DISCHARGE SUMMARY
Admitted: 9-19-74
Discharged: 9-24-74
PROVISIONAL DIAGNOSIS: Acute psychotic episode.
REASON FOR ADMISSION: Apparently patient was behaving in a very destructive and bizarre fashion and was intoxicated and the police were called on the scene when she was seen breaking windows, etc. and was not able to control herself.
When she was brought in here she claimed that there was nothing the matter with her, the police

Note 2-Continued
are against her and this is why they have made a false arrest, etc. etc. and did not seem to comprehend what was happening at all. According to the patient she has had no complaints whatever and everything that happened was just a slight argument between her and her boyfriend-with whom she has been recently living.
SIGNIFICANT FINDINGS: The physical examination revealed that the patient is grossly obese and with a blood pressure of 140/90 and the rest of the systems were within normal limits. She complained that she had irregular vaginal bleeding but does not appear to be anemic or anything to substantiate this.
Psychiatric examination revealed a 28 year old agitated restless woman who was unable to comprehend what was happening. She was demanding to be released from here, appeared to be very paranoid about the whole staff here as well as the police who had brought her here. Claimed that everybody was against her and trying to frame charges on her. She denied any hallucinations and no obvious delusional material other than this paranoid ideation could be noticed. She had obviously very poor insight and very poor problem and at the time of admission she was intoxicated.
Lab workup showed that the patient's hemogloblin and BBC and WBC were within normal range. VDRL was negative. SMA-17 was normal. Urinalysis showed no abnormality. Chest x-ray was within normal limits.
TREATMENT RECEIVED: Patient was encouraged to participate in all the activities and the milieu therapy which she very reluctantly did and always demanded to be released and claimed that she was not sick at all and did not get any insight into her problem. However, she was also put on Thorazine 100 mgm. b. i. d. and 200 mgm. at hs which seemed

The trial court granted defense motion for sanity inquisition by order dated November 5, 1974, and appointed two physicians to examine the appellant and to answer these questions:

Was the Defendant, CHIRSTINA I. CONNORS, mentally competent and responsible on

Note 2-Continued

to calm her down to a certain extent. All through the stay she complained about the medication, though admitted at times that it was relaxing her and make her think clearly. After about 48 to 92 hours she accepted that she need some help and revealed that she has had previous psychiatric admissions into other hospitals and seemed to gain some insight into her problems. But basically the patient did not participate in any other activities other than just medication and on the 5th day she refused to sign voluntarily, and since there was nothing to justify committing her the patient was allowed to go at her own request in care of the police.
CONDITION ON DISCHARGE: Improved.
PLANS FOR FUTURE CARE: Including prescribed medications, patient has been discharged on 100 mgm. of Thorazine b. i. d. and 200 mgm.hs. She has been given 2 weeks supply and has been advised to continue her follow up with the Pasco County Mental Health Clinic.
FINAL DIAGNOSIS: Physical-the patient appears to be grossly obese and had mild hypertension and should be treated for this on the out-patient basis.
Psychiatric-SCHOZOPHRENIA, PARANOID TYPE.

the day/at the time of the alleged commission of the offenses as alleged in the information in these cases to the extent that she knew right from wrong or was aware of the nature and consequences of her alleged acts?

Was the Defendant, CHRISTINA I. CONNORS, mentally capable on the date of examination of understanding the charges of Petit Larceny[3] and Motor Vehicle Theft which have been placed against her and to be aware of the gravity of the charges?

Was the Defendant, CHRISTINA I. CONNORS, capable on the date of examination of assisting her attorney in her own defense in these trials on the charges of Petit Larceny and Motor Vehicle Theft?

If the examination discloses that the Defendant, CHRISTINA I. CONNORS, is suffering from a mental disease which will incapacitate her in the manner implied by the previous questions, is this mental disease of a permanent or temporary nature?

Missing from the record on appeal is any transcript of proceedings on December 2, 1974, which proceedings were deemed to obviate the necessity for trial by jury, earlier scheduled to begin the following day.

3. Although no accusatorial pleading alleging petit larceny is part of the record before us, it appears that the subject of the alleged petit larceny consisted of the contents of the automobile in question.

The court minutes for December 2, 1974, are in the record and read, in part, as follows:

* * * * * *

The defendant appeared with her attorney, Robert Focht, Assistant Public Defender. The Court found the defendant not guilty by virtue of insanity[4] and committed her to the State Hospital for hospitalization and treatment.

The Court advised the defendant of her right to appeal.

Court recessed at 8:20 p. m.

The trial court's joint judgment of acquittal and order of commitment,[5] and the psychiatrists'

4. Apparently no ruling was made by the trial court pursuant to Rule 3.210(a), RCrP as to Mrs. Connors' competency to stand trial. *See Fowler v. State*, 255 So.2d 513 (Fla. 1971); *Emerson v. State*, 294 So.2d 721 (Fla. 4th App.Dist.1974). There is no indication in the record that Mrs. Connors or her counsel raised the defense of insanity by filing notice pursuant to Rule 3.210(b), RCrP.

5. This cause coming on to be heard for determination of Defendant's sanity at the time of the alleged offenses with a stipulation by the State and the Defendant that said issue shall be determined fully from the reports heretofore received from Drs. W. H. McConnell and Peter J. Spoto, upon Non-Jury Trial, and upon the stipulation of the State and the Defendant that said issue also be determined solely from the reports of the aforesaid examining physicians and the Court having received the stipulation

letters,[6] incorporated therein by reference,

Note 5-Continued

and having carefully reviewed said medical reports finds as follows:

1. That at the time of the alleged offenses, the Defendant was suffering from paranoid schizophrenia; that she did not know right from wrong and was insane.

2. The discharge of the Defendant would be manifestly dangerous to the peace and safety of the people with whom Defendant might come in contact.

Therefore, you, Christina I. Connors, being now before the Court, attended by your attorney, Robert Focht, the Court having returned a verdict of Not Guilty by Reason of Insanity, the Court does hereby adjudge you Not Guilty by Reason of Insanity of the offenses of Motor Vehicle Theft and Petit Larceny.

Pursuant to Rule 3.460, Florida Rules of Criminal Procedure, the Defendant, Christina I. Connors, is hereby committed to the Division of Mental Health of the Department of Health and Rehabilitative Services, pursuant to Florida Statute 394.67 (3)(b) and the reports of each of the examining physicians are hereby incorporated herein by reference and made a part hereof.

DONE AND ORDERED in open Court at New Port Richey, Pasco County, Florida, this 2nd day of December, 1974.

6. Dear Judge Keough,

Thank you for referring Miss Christina I. Connors, age 28, to this office. She was brought to my office by Mr. Lecouris of the Public Defender's office on Nov. 14, 1974. She was interviewed

Note 6-Continued

alone for background information and then she was examined alone at length.

Miss Connors who is short and obese was concerned but pleasant and cooperative. She stated that she had frequent headaches, was easily upset and excitable sometimes to the point of developing blackouts lasting an hour or more. She admitted to very faulty memory particularly since receiving electroshock therapy in a New Jersey Hospital some three years ago.

She said her parents were divorced when she was six years old and that there had always been much conflict between her mother and herself especially since the birth of the patient's illegitimate son, now age 9 years. She admitted she had a long record of petty misdemeanors and frequent jailing since about 1964. When asked why, she said she needed to steal because she could not afford to clothe her son and herself. In about 1967, she began sniffing glue for relief from the constant bickering by her mother about her small son. This lead to further anti-social acts and more arrests for "glue sniffing". About three years ago, her son was removed from her custody and she admits to a nervous breakdown that lead to her commitment to the New Jersey State Hospital where she received electroshock therapy. She does not remember any symptoms but does remember that she was admitted three or more times, the last of which was apparently in the spring of 1974. She was put on Thorazine and advised to not work, come to the South and now she is receiving Social Security disability checks of about $147.00 a month.

She did come south because her mother who had remarried lives here with her husband. Due to a very faulty memory time and events are very vague and sketchy but she said she arrived in a Mississippi

Note 6-Continued

licensed car which she said she bought for $800.00 and which others say was stolen. On June 28, 1974, her latest altercation with the law occurred which is well documented and witnessesd in which she arrived at a bar with a bundle of her clothes and she ordered something to drink. She with the clothes was observed leaving in a car, not hers. The car had been left unattended with the keys, a watch and some tape decks. The car was subsequently found several blocks away with her clothes in it. In the meantime, she attempted unsuccessfully to sell the watch. A short time later she was located nearby and denied having taken the car but on demand, gave up the keys and watch and also identified her clothes that were in the car.

According to her version which she had maintained since the first until and including my examination, she and her mother had a bad argument. She decided to leave her mother's home and packed her clothes in a bundle. She went to the bar to have a drink and later she went back home where the police showed up and arrested her. She said she became very upset and emotional which lead to her being hospitalized in a Tampa hospital where she remained for two weeks. Prior to her actual arrest, she denies any blackout saying she remembers perfectly everything from the time of her fight with her mother until she got back home. Being unable to account for her clothes being in the car, she says someone must have taken them from the bar and put them there.

It is to be noted at this point that she freely admits to having periodic "blackouts" that are usually preceded by something unpleasant like being aggravated, accused, criticized, even drinking alcohol, and, in the past, too much "glue sniffing". She also freely

Note 6-Continued

and unashamedly admits to shop-lifting, stealing, etc. under the excuse of need, and freely without a show of emotion, admits to mental and emotional disturbances requiring hospitalization, treatment and constant medication. It is indeed strange, except in a mental case, that she so tenaciously sticks to her story of the last two car appropriations when she appears to be without shame, humiliation or embarrassment concerning so many of her previous anti-social activities, the birth of her illegitimate child as well as her own history of mental instability.

The MENTAL STATUS EXAMINATION showed a woman with an actual, apparent and mental age of about 28, with a rather blank, unemotional expression. Her personality was ambiverted tending toward introversion. She alleges 11 years of education in a Catholic school in Philadelphia. There appeared to be no increase in tension and she seemed perfectly relaxed. Mental reaction was very sluggish and she had an extremely poor memory for past events in which she confabulated to cover up unremembered dates, times and places. Present memory was questionable. She was cooperative and interested and was concerned about her health and mental condition.

She is in flight from the world of reality and responsibility. Insight and judgment are extremely poor. Her attitude was somewhat downcast and she blames everyone else for her troubles including her mother and the police. Behavior is within normal limits at this time. She is oriented as to time, place and person and denied specific hallucinations, illusions or delusions while on medication. She alleges no memory of past psychotic symptoms but there is a strong indication that she does suffer from delusions of persecution, and it is to be remembered that she is receiving disability checks

Note 6-Continued

following her last hospitalization in the New Jersey State Hospital.

It is my opinion that the diagnosis is Paranoid Schizophrenia, in a state of poor remission even on medication and that she is borderline in regards to her competency or incompetency.

In answer to the question of Miss Connor's competency on June 28, 1974, only an educated guess can be given after almost four & ½ months of elapsed time. She allegedly had been released only a short time from the New Jersey State Hospital. It is not known whether she continued to take her medication (Thorazine); there was an alleged conflict with her mother; she was drinking and she denied in the face of all evidence that she illegally took either car, and it is a fact she was placed in the mental ward of a Tampa hospital following her arrest. I believe it would be safe to say that she was incompetent and did not know right from wrong at that time.

On the date of my examination, she appeared to be fairly competent, appeared to know right from wrong and was very much aware of the gravity of the charges placed against her.

On the date of my examination she was capable of assisting her Attorney in her own defense for present occurences but probably would be ineffectual as regards the times of her alleged offenses.

It is my opinion that she is suffering from a reoccurring psychotic disability that shows up under stress in which she attempts to strike back at all the unfairness that the world, her family and others perpetrate upon her. During these periods, she does many anti-social acts that later, particularly under

Note 6-Continued

the threat of punishment, are excluded from her mind. When there is no stress and she continues with her treatment, she can make an adjustment and even hold down jobs that are not too demanding. Since it is the nature of this type of psychosis to recur under stress, it is respectfully suggested that she be put on probation and let out of jail only so long as the remains under the active care of a qualified doctor or clinic who would be empowered to hospitalize her whenever she becomes periodically incompetent.
Respectfully,
W. H. McConnell, M.D.

Dear Judge Keough:

As ordered by you I have performed a psychiatric examination on Christina I. Connors a 28 year old, short, obese female who had poor oral hygiene and decayed teeth were evident. She was brought here by her Public Defender who stated she was out on bond. She completed all of her examination with full cooperation on her part. She was extremely friendly and cooperative and did not hesitate to give a full account of her past history which is of significance in that she has been quite disturbed, both mentally and emotionally, off and on since about 1967. At that time she began sniffing glue. She had a tragic beginning and an extremely traumatic early life which, I am sure, contributed to her disturbance.

Her mother is 48 years of age and has a weight problem. She lives in New Port Richey. She has been married four times. The patient's real father is 52 years of age. They were divorced when the

Note 6-Continued

patient was five years old. The patient has three step brothers ages 4, 5, and 9. She stated "the 5 year old is retarded". She has two sisters, ages 27 and 26, who are apparently in good health.

She was born in Philadelphia, Pennsylvania on April 1, 1946. She had an eleventh grade education and quit school at age 16. She had a common law relationship with a man and there is a child, a male age 9, who is a ward of the Court and is out of the State at the present time. She is on disability through Social Security because she is not able to work. She characterizes her problems as headaches, which she knows are emotional, and blackout spells. Despite her obesity, she stated she has had a recent weight loss of 25#. She came to Florida five months ago and was living with a man at the time of the alleged act because "we shared expenses."

According to the Statement of Facts the alleged act occurred on June 28, 1974. Following this alleged crime the patient had an acute psychotic episode which necessitated hospitalization. She was hospitalized on September 19, 1974 and discharged on September 24, 1974 with condition on discharge as improved and the final psychiatric diagnosis on discharge was Schizophrenia, paranoid type. She did not sign a voluntary hospitalization and for this reason she was discharged in care of the police. This occurred approximately three months subsequent to the alleged date of the motor vehilce theft and petit larceny.

From the description of the Statement of Facts if this individual was drinking at the time, and she probably was, it would seem to me that she did not know right from wrong at the time of the alleged act. She probably was psychotic at that time. She denies any knowledge of taking the car.

are in the supplemental transcript of record which this Court ordered to be prepared, *sua sponte*.

Note 6-Continued

There is past history of hospitalizations in another State and she is on disability at the present time probably because of her mental illness. As stated above, she began sniffing glue in 1967. She was hospitalized two or three times at the Ancora State Hospital in New Jersey in 1967 and she was hospitalized at the Trenton State Hospital in 1969.

At the time of my examination it is my feeling that she is able to understand the charge of Petit Larceny and Motor Vehicle Theft which has been placed against her and she is also aware of the gravity of these charges. She is capable, at this time, of assisting her attorney in her own defense on these charges. The patient is suffering from a chronic mental illness which has exacerbations and remissions and I am sure this will give her difficulty from time to time. The patient should have continued treatment at the local Mental Health Clinic. I think she is receiving treatment at the local Mental Health Clinic because she was referred there by her physician when she was hospitalized at the Tampa Heights Hospital in September of 1974. She stated she is taking Thorazine 100mg. b.i.d. and Thorazine 200 mg. at h.s.
Sincerely,
Peter J. Spoto, M.D.

On December 6, 1974, the trial court, "having been advised that its (order of commitment) would not be obeyed unless and until (Mrs. Connors) underwent civil commitment pursuant to other provisions of the Baker Act", directed an order to show cause to Dr. Stuart Cahoon, Director of the Division of Mental Health, why he should not be held in contempt of Court for failure to accept Mrs. Connors as an inmate in a mental institution. By motion to dismiss order to show cause, counsel for Dr. Cahoon brought to the trial court's attention Fla. Stat. § 394.467(3)(b) (1974 Supp.) which, as amended, had taken effect only a few months before. In response to Dr. Cahoon's motion to dismiss, the trial court entered a supplemental commitment order dated December 20, 1974, declaring that "Florida Statute 394.467(3)(b) is unconstitutional or otherwise ineffective and inoperative as applied to the defendant . . . and all other defendants in like circumstances," and concluding that such a finding "appears to be more appropriate at this time than a continuation of contempt proceedings against Dr. Stuart Cahoon."

In its zeal to vitiate portions of Fla. Stat. § 394.467(3)(b)(1974 Supp.), the majority loses sight of the particular case before us. Even though the trial court's ruling applies specifically "to this defendant," and "other defendants in like circumstances" the majority makes no mention of the fact that neither Mrs. Connors nor any other criminal defendant is any longer a party to this cause. *At no*

time has Mrs. Connors appealed from any order entered in the course of these proceedings. Dr. Cahoon was never adjudged in contempt, and the order to show cause directed to him was effectively dissolved by the order of December 20, 1974, which was entered of record three days later. The only notice of appeal filed in this cause begins, "FLORIDA DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES, DIVISION OF MENTAL HEALTH, Appellant-Defendant, takes and enters its appeal . . ." In no accepted sense, however, was the Division of Mental Health, itself an arm of state government, a party defendant in Mrs. Connors' prosecution.

This is not to say that the Division of Mental Health has no interest in whether statutes under which it operates are constitutional. Naturally the Division of Mental Health must be very concerned with such questions, and perhaps it would have standing on just that basis in some action for declaratory relief, brough pursuant to Fla. Stat. § 86.011 (1975). *Cf. Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). There is no provision under Florida law, however, for "declaratory appeals." Even where a case is certified to this Court by a District Court of Appeal as presenting a question of great public interest, the Court will refrain from deciding the merits if the question is not squarely posed by the certified case. *State v. Burgess*, Fla., 326 So.2d 441 (1976). Similarly, questions certified for appellate review pursuant to Rule 4.6, Florida Apellate Rules, 1962 Revision, go

unanswered unless they are "determinative of the cause." Rule 4.6(a), *supra; Niemi v. Mebane Oil Co., Inc.*, 303 So.2d 661 (Fla. 4th App.Dist.1974); *Iorio v. State*, 297 So.2d 116 (Fla.4th App.Dist.1974). In the present case, likewise, the Court is asked to resolve a difference of opinion with no assurance that its mandate will have any concrete effect.

Here as in *Ervin v. City of North Miami Beach*, 66 So.2d 235 (Fla. 1953) the "real relief sought in this case is an Advisory Opinion of this Court construing a statute." At 236. The Court should decline to grant such relief since the "Constitution of Florida only gives to the Governor of the State the right to request advisory opinions from the Justices of this court . . ." *Ready v. Safeway Rock Co.*, 157 Fla. 27, 24 So.2d 808, 811 (1946) (Brown, J., concurring). Certainly the Division of Mental Health of the Department of Health and Rehabilitative Services has not been authorized to seek advisory opinions from the Court. The "judicial power" in Florida, as in the Nation, "is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction," *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 255, 55 L.Ed. 246, 252 (1911), with the lone exception of gubernatorial requests for advisory opinions. When the Court overreaches its jurisdiction in order to decide questions which do not "determine actual controversies," it invades the province of the other branches of government.

Ostensibly, the majority agrees with Mr. Justice Brown, when he wrote in *Ready v. Safeway Rock Co.*, 24 So.2d at 810:

> We must not forget that . . . our Constitution divides the powers of the State of Florida into three grand divisions, the legislative, the executive and the judicial departments.

It is on the ground of separation of powers that the Court today strikes down a statute which was reenacted, as amended, by unanimous vote of both houses of the legislature in the 1974 session. 1974 *Journal of the House* 1235; 1974 *Journal of the Senate* 788. According to the majority, the statute conflicts with a previously adopted court rule, and must therefore fall. *But see* Fla.Const. art. V. § 2(a) (1973). Whenever possible, however, striking down "a solemn act of the Legislature," *Sarasota-Fruitville Drainage District v. Certain Lands, etc.*, 80 So.2d 335, 337 (Fla. 1955) should be scrupulously avoided. *Singletary v. State*, 322 So.2d 551 (Fla. 1975); *Williston Highlands Development Corp. v. Hogue*, 277 So.2d 260 (Fla. 1973); *Overstreet v. Blum*, 227 So.2d 197, 199 (Fla. 1969). The majority asserts that such extreme action must be taken in the present case in order to preserve the separation of powers intact. Ironically, in the name of preserving the separation of powers, the Court has blurred the distinctions between the separate branches of government by passing on a statute as a general proposition, in much the same way

the governor might, when exercising the power of the veto.

POWELL v. GENUNG
Cite as, Fla., 306 So.2d 113

James POWELL, Petitioner,

v.

Don GENUNG, Sheriff, Pinellas County, Florida, and Peter Ivory, M.D., Superintendent, Florida State Hospital, Chattahoochee, Florida, Respondents.

No. 45224.

Supreme Court of Florida.

Dec. 4, 1974.

Rehearing Denied Feb. 5, 1975.

Petitioner instituted original proceeding for writ of habeas corpus to secure his release from state hospital to which he was committed after jury found him not guilty of murder by reason of insanity. The Supreme Court, Roberts, J., held that trial court in which

petitioner was found not guilty properly retained jurisdiction over petitioner to enter initial order committing him to state hospital for treatment and subsequent order denying petitioner's motion to compel his release from the state hospital, and that evidence sustained determination that, although superintendent of the state hospital stated that petitioner was no longer dangerous to safety of others, petitioner was in fact manifestly dangerous to himself and others and justified order precluding his release from the hospital.

Writ discharged.

Ervin, J., dissented and filed opinion.

1. Mental Health 440

Evidence sustained determination that petitioner who had been adjudged not guilty of murder by reason of insanity and committed to state hospital remained manifestly dangerous to others and justified order precluding petitioner's release from the hospital, even though superintendent of hospital stated that petitioner was no longer dangerous to the safety of others. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.460; West's F.S.A. § 394.451 et seq.; F.S.1969, §§ 917.01,919.11.

2. Mental Health 439, 440

Trial court in which petitioner was adjudged not guilty of murder by reason of insanity properly retained jurisdiction over petitioner to enter initial order committing him to state hospital for appropriate treatment and subsequent order determining that he remained dangerous to others and precluding his release. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.460; West's F.S.A. § 394.451 et seq.; F.S.1969, §§ 917.01, 919.11.

Arnold D. Levine of Levine, Freedman & Hirsch, Tampa, for petitioner.

James T. Russell, State's Atty., Denis M. DeVlaming, Asst. State's Atty., and James G. Mahorner, Tallahassee, for respondents.

ROBERTS, Justice.

This is an original proceeding in Habeas Corpus. We issued the writ and respondents have filed a return.

Petitioner was charged with murder in the first degree and was found by the jury to be not guilty by reason of insanity. The trial court, thereafter, denied petitioner's motion for entry

of judgment of acquittal and for discharge, and after considering the evidence adduced at the trial, the plea of not guilty by reason of insanity and the jury's verdict, the trial judge concluded that petitioner is manifestly dangerous to the peace and safety of the people and should not be allowed to go at large, and ordered him committed to the state hospital for treatment pursuant to Rule 3.460, Fla. Cr.R.P. On May 24, 1973, the trial court entered an order requiring that defendant be transported to the Florida State Hospital at Chattahoochee, Florida, for appropriate treatment. Specifically the trial judge in said order stated:

> "It is therefore ORDERED AND ADJUDGED that the defendant, JAMES POWELL, shall be transported to the Florida State Hospital, Chattahoochee, Florida, by the Sheriff of Pinellas County, Florida, and delivered to the Superintendent thereof, and that he be there confined, detained, and treated *until the further order of the court*, and in the event said defendant shall cease to be manifestly dangerous to the peace (sic) and safety of the people, *said fact shall be reported to this court for further order.*" (emphasis supplied)

By letter of January 22, 1974, Respondent Peter Ivory, Superintendent of the Florida State Hospital, advised the trial court, as follows:

> "Mr. James Powell was admitted to the Florida State Hospital on June 20, 1973, as involuntary incompetent. His treatment has been completed and further hospitalization is not indicated at this time. He has been found no longer dangerous to the safety of others."

The cause then came on to be heard before the trial court on the report of the Clinical Director of the Florida State Hospital at Chattahoochee and the trial judge ordered that defendant be returned to the court for further proceedings. Following a hearing, the trial court entered an order dated March 12, 1974, denying petitioner's motion to compel release and explicitly stating:

> "The Court finds that it has jurisdiction of the person of James Powell and of this cause.
>
> "The recommendations of the hospital and treating physicians are based upon the assumption that this court would have continuing jurisdiction

over James Powell after his discharge from hospitalization and consequently could recognize and prevent future narcotic intoxication. This assumption is incorrect.

"This court finds from the evidence that the underlying psychosis remains even though the sumptoms are in a state of remission. The patient remains a manifest danger to himself and others and therefore his hospitalization should be continued.

"It is thereupon Ordered that the Motion To Compel Release is denied.

"It is further ORDERED AND ADJUDGED that the Sheriff of Pinellas County, Florida or his duly appointed deputy shall forthwith transport the said JAMES POWELL to the Florida State Hospital, Chattahoochee, Florida; the Superintendent thereof shall accept the said James Powell to be there confined, detained and treated until the further order of this Court, and that in the event said JAMES POWELL shall cease to be manifestly dangerous to the peace and safety of the people, said fact shall be reported to this Court for further order."

By the instant petition for writ of habeas corpus, petitioner seeks an order

from this Court declaring the trial court's orders of May 24, 1973, and March 12, 1974, to be null and void, and authorizing petitioner's release pursuant to Chapter 394, Florida Statutes.

Respondents, Peter Ivory, Superintendent, Florida State Hospital at Chattahoochee, and Don Genung, Sheriff of Pinellas County, Florida, have filed separate returns to the writ of habeas corpus.

(1) Respondent, Sheriff Genung, correctly states that although the letter of the Superintendent states that the petitioner is no longer dangerous to the safety of others, the committing court after conducting a thorough hearing on March 6, 1974, found that petitioner was in fact manifestly dangerous to himself and others. This finding by the trial court is fully supported by the transcript of the hearing held on March 6, 1974, and the evidence presented at this hearing sustains and justifies the trial court's finding as to the necessity for the continued treatment of petitioner at the state hospital. Pursuant to and consistent with Rule 3.460, Fla. Cr.R.P., which provided prior to amendment, and at the time of commitment, as follows:

"Rule 3.460 Acquittal for Cause of Insanity. When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause. If the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person; otherwise he shall be discharged."

This rule is substantially identical to Section 919.11, Florida Statutes, the statutory precursor of Rule 3.460, which statutory provision was repealed by the Legislature by Chapter 70-339, Laws of Florida, as having been superceded by the Rules of Criminal Procedure. Section 919.11, F.S., had been interpreted by the courts of this state to allow continuing jurisdiction over petitioner in the trial court to determine by subsequent hearing and order whether defendant was still manifestly dangerous to the public. State v. Eaton, 161. So.2d 549 (Fla.App.1964), Oksten v.

State, 173 So.2d 489 (Fla.App.1965), cert. den. 177 So.2d 11 (Fla.1965), U.S. cert. den. 382 U.S. 867, 86 S.Ct. 139, 15 L.Ed.2d 105. This Court by amendment clarified[1] the rule which presently provides as follows:

"Rule 3.460 Acquittal for Cause of Insanity. When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause. If the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person and such person shall be held in custody until released by order of the committing court, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person; otherwise he shall be discharged."

[1] The amendment did not actually constitute a change in procedure provided for by the rule but rather constituted a clarification.

(2) The trial court properly retained jurisdiction over petitioner to enter the aforestated orders. In accordance with Rule 3.460, he continues to be held under the jurisdiction of the circuit court of Pinellas County, Florida until released by order of that court. State v. Eaton, *supra*, and Oksten v. State, *supra*.[2]

By the instant proceedings to determine whether petitioner, who had been found not guilty by reason of insanity of murder in the first degree, no longer posed a dangerous threat to the safety of himself and others, he was afforded all constitutional due process requisite in that, inter alia, he was allowed the right to be confronted with the witnesses against him, to cross-examine them, and

[2] Again, we note that Section 919.11, Florida Statutes, which was interpreted and applied in *Oksten, supra*, and *Eaton, supra*, which cases are *factually identical* to the instant cause is substantially identical to Rule 3.460 in effect at the time of petitioner's adjudication and commitment.

to offer evidence of his own. Following his commitment in 1973, he requested a hearing to determine whether he is still manifestly dangerous to the peace and safety of the people. The committing court granted this full hearing whereat petitioner was represented by counsel, and at the conclusion of which the trial judge properly determined that petitioner continues at the present time to pose a danger to others. See Oksten v. State, *supra*, and State v. Eaton, *supra*.[3]

Petitioner's reliance on Jones v. O'Connor, 185 So.2d 167 (Fla.1966), and Trippodo v. Rogers, 54 So.2d 64 (Fla. 1951), as authority for his release is misplaced as evidenced by the facts thereof. In both *Jones, supra*, and

[3] We are not unmindful of the decisions of the Supreme Court in Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), Specht v. Patterson, 386 U.S. 605 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972), and Jackson v. Indiana" 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), with which the instant decision is clearly consistent. Those decisions deal with the right to a hearing before commitment to a mental hospital.

Trippodo, supra, the State entered a *nolle prosequi* to the charges. This Court in *Jones, supra,* determined that a *nolle prosequi* of a first degree murder charge where the defendant was found insane and committed to the state hospital eliminated the necessity of the committing court's approval as a condition of release. In *Trippodo, supra,* the defendant was charged with first degree murder, was adjudged to be insane and incapable of standing trial, was committed to the state hospital for treatment and safekeeping, and the indictment against him was unconditionally *nol prossed.* He was subsequently found to be sane by the Superintendent and medical staff of the Florida State Hospital. This Court determined that in view of the fact that the criminal charge of murder in the first degree had been unconditionally *nol prossed* upon motion of the State Attorney, the provisions of Section 917.01, Florida Statutes (1949),[4] requiring the consent of the committing court as a condition precedent to release of the petitioner were not applicable. Sub judice, petitioner was not committed pursuant to Section 917.01, Florida Statutes, but rather was found sane to stand trial, was found not guilty

[4] By Chapter 70-339, "An Act relating to criminal procedure," the Legislature repealed several statutory provisions relating to criminal procedure which had been superseded by the Florida Criminal Rules of Procedure, including Section 917.01, F.S.

by reason of insanity, was adjudged not guilty by reason of insanity and was committed by order of the trial court pursuant to Rule 3.460, Florida Criminal Rules of Procedure. *Jones, supra,* and *Trippodo, supra,* are not controlling in the instant case.

The finding by the trial judge that petitioner is still manifestly dangerous is supported by the evidence adduced at the hearing. Accordingly, in view of the abovestated reasons, we find no merit in the petition for habeas corpus. The writ heretofore issued must be and is hereby

Discharged.

ADKINS, C. J., and BOYD, McCAIN, DEKLE and OVERTON, JJ., concur.

ERVIN, J., dissents with opinion.

ERVIN, Justice (dissenting):

This is an original habeas corpus proceeding wherein we issued the writ and Respondents filed a return. The facts as developed by the pleadings are as follows:

Petitioner was tried by a jury for first degree murder and found not guilty by reason of insanity. Thereafter the trial court denied Petitioner's motions for entry of judgment of acquittal and for discharge. It further found Petitioner manifestly dangerous to the peace and safety of the people and ordered him to the State Hospital for treatment pursuant to Rule 3.460, Cr.P.R. On May 24, 1973 a subsequent order was entered providing in part:

> "(T)he defendant, JAMES POWELL, shall be transported to the Florida State Hospital, Chattahoochee, Florida by the Sheriff of Pinellas County, Florida, and delivered to the Superintendent thereof, and that he be there confined, detained and treated *until the further order of the court*, and that in the event said defendant shall cease to be manifestly dangerous to the peace (sic) and safety of the people, *said fact shall be reported to this Court for further order.*" (Emphasis supplied)

By letter of January 22, 1974, Respondent Superintendent of the State Hospital advised the trial court that:

> "Mr. James Powell was admitted to the Florida State Hospital on June 20, 1973, as an involuntary incompetent. His

> treatment has been completed and further hospitalization is not indicated at this time. He has been found to be no longer dangerous to the safety of others."

Petitioner was then returned to the trial court for further proceedings. Following a hearing, the trial court entered an order on March 12, 1974, denying Petitioner's motion for release and ordering Petitioner returned to the State Hospital, notwithstanding the recommendation of the hospital staff.

Petitioner seeks an order of this Court declaring null and void the trial court orders of May 24, 1973 and March 12, 1974, and authorizing his release pursuant to Chapter 394, F.S., known as the Baker Act, and more particularly Sections 394.467 and 394.469 thereof.

Respondents urge essentially that the trial or "committing" court retained continuing jurisdiction over Petitioner, and Petitioner may not be discharged without further order thereof since (1) Rule 3.460, as amended, so provides and (2) the Baker Act applies only to civil and not criminal proceedings. I disagree.

Rule 3.460, as amended and effective January 16, 1974 (see 287 So.2d 678), provides:

"When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause. If the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person *and such person shall be held in custody until released by order of the committing court*, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person; otherwise he shall be discharged." (Emphasis supplied.)

The emphasized language, however, was added by amendment subsequent to the time of Petitioner's initial commitment pursuant to the Rule, and may not be made to retroactively confer continuing jurisdiction over Petitioner in the trial court if there was none prior to the amendment. The trial court was bound to follow the law as it existed at the time of Petitioner's committal for treatment.

Respondents rely alternatively on Oksten v. State, Fla.App.1965, 173 So.2d

489, and State v. Eaton, Fla.App.1964, 161 So.2d 549, as authority for continuing jurisdiction over Petitioner prior to amendment of the Rule. In both cases cited, the Second District Court held that where petitioners were committed under Section 919.11, F.S., the statutory precursor to Rule 3.460 prior to amendment, there was sufficient evidence before the trial courts to deny petitioners' motions for discharge. *Oksten* and *Eaton* were decided prior to the enactment of the Baker Act, which must be read in pari materia with the Rule. Together they govern the commitment and discharge of persons committed pursuant thereto. Hence, *Oksten* and *Eaton* are no longer controlling in such circumstances.

Nor do I agree with Respondents that the Baker Act is applicable only to civil proceedings. The Act by its express language shows the intent of the Legislature to apply it to civil and criminal proceedings alike, and we are bound to observe that intent. Section 394.467, generally, provides for admission criteria and procedures, hearing, and continued hospitalization of involuntary patients. Subsection (3) thereof expressly provides for commitment under the Florida Rules of Criminal Procedures, inter alia, which clearly contemplates commitment as in the instant case under Rule 3.460. Subsection (4) thereof imposes guidelines

for the exercise of the hospital administrator's power to discharge such involuntary patients as follows:

> "(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is dangerous to himself or others. In any case in which the administrator has reasonable cause to believe that an involuntary patient is dangerous to himself or others, the administrator shall request continued hospitalization. In any case in which a request for continued hospitalization is necessary, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets the criteria for involuntary hospitalization at the time of application for transfer to voluntary status and the patient needs continuing hospitalization, the patient shall be transferred to a voluntary status."

Most importantly, Section 394.469 provides in part:

> "(1) Power to discharge.--At any time a patient is found no longer to meet the criteria for involuntary hospitalization, the administrator may:
>
> "(a) Discharge the patient, unless the patient is *under a criminal charge,*

in which case he shall be transferred to the custody of the appropriate law enforcement officer.

> "(b) Transfer the patient to voluntary status on his own authority or at the patient's request, unless the patient is *under criminal charge;* or
>
> "(c) Place an improved patient, except a patient *under criminal charge,* on convalescent status in the care of a community facility.
>
> "(2) Notice.--Notice of discharge or transfer of status shall be given to the patient, his guardian or representatives, and, if the patient's hospitalization was by order of a court, the court which entered such order." (Emphasis supplied.)

Thus, it is abundantly clear that the Baker Act was intended to apply to both civil and criminal commitment proceedings, and intended to be read in pari materia with Rule 3.460 except to the extent that any contradictory language in the Rule validly supersedes the statute. The Rule prior to admendment, applicable herein at the time of Petitioner's commitment, did not provide for continuing custody until released by order of the committing court; rather, it provided for commitment alone. On the other hand,

the Baker Act, also applicable at the time of Petitioner's commitment, expressly provided procedures and guidelines for discharge as well as commitment. In failing to so construe the Rule and the Act together, the trial court erred and exceeded its jurisdiction.

Petitioner relies upon Jones v. O'Connor, Fla.1966, 185 So.2d 167, and Trippodo v. Rogers, Fla.1951, 54 So.2d 64, as authority for his release. The facts show Petitioner's reliance thereon is misplaced. In *Jones, supra,* this Court held that a nolle prosequi of a first degree murder charge where the defendant was found insane and committed to the State Hospital eliminated the necessity of the committing court's approval as a condition of release. In *Trippido, supra,* where a defendant charged with first degree murder was adjudged insane and committed to the State Hospital for treatment, the indictment was nol prossed and the defendant was subsequently found sane by the hospital staff, the defendant was entitled to release notwithstanding the statute requiring the committing court's consent to release which had not been given. Unlike the instant case, in Jones and Trippodo both defendants were found insane and incapable of standing trial and were committed pursuant to Section

917.01, F.S. (Since repealed. See Rule 3.210, Cr.P.R.) Subsequently, all charges against both defendants were dropped without trial or an acquittal by reason of insanity. As we said in *Trippodo:*

> "Section 917.01, Florida Statutes 1949, F.S.A., provides a method by which a trial court having jurisdiction of the defendant in criminal proceedings, may, where the accused is thought to be insant, conduct a hearing in the pending cause, without the necessity for a separate independent proceeding before the county judge, as contemplated by sections 394.20-22, Florida Statutes 1949, F.S.A. If the trial court, after a hearing on the issue, decides that the defendant is sane, it may proceed with the trial; but if it decides that the defendant is insane, it has the power to commit him to an institution for the insane until he has regained his sanity. In order to insure the return of the defendant to the court in which the criminal proceeding is pending, so that he may be available to answer the pending criminal charge, the statute provides that no defendant committed by a trial court to an institution for the insane shall be released from such institution until the proper officer of such institution has reached the opinion that he is sane and has secured the consent

of the committing court for his release." (54 So.2d,at 65.)

Petitioner herein was not committed pursuant to Section 917.01 (or Rule 3.210), but was instead found sane to stand trial, adjudged not guilty by reason of insanity and committed under Rule 3.460. The distinctions are obvious; *Jones* and *Trippodo* are not here controlling, but the underlying rationale analogously appears to support the view a discharge is in order where no charges are pending and petitioner is found to be sane.

In passing, I note that no criminal charges are now pending against Petitioner--nor can there by any new ones lodged against him on the facts involving the murder charge because of double jeopardy--which would adversely affect his eligibility for discharge under Section 394.469. Furthermore, it is not necessary to express an opinion on Petitioner's allegations that Rule 3.460 is unconstitutional as applied on the grounds that it provides no criteria for release and in no way depends on the recommendations of the hospital staff. Nor do I express an opinion as to the findings of the trial court or the testimony presented thereto at the hearing held on March 6, 1974 upon Petitioner's second motion for release, nor upon the effect of the amendment of Rule 3.460 (effective as of

January 16, 1975) on its interaction with the pertinent provisions of the Baker Act. Whether further retention of the Peitioner under such circumstances is an abuse of discretion need not be passed upon inasmuch as the controlling law existing at the time of Petitioner's committal now requires his discharge.

By way of summation, the trial court had no continuing jurisdiction over Petitioner subsequent to his commitment under the Rule, and those portions of the trial court order of May 24, 1973 making Petitioner's release conditioned upon further court order, and all of the trial court order of March 12, 1974, were made without authority of law. Petitioner should be returned to the custody of the State Hospital and held there for treatment until his discharge pursuant to the appropriate procedures of the Baker Act, without further order of this Court or the trial court below.

Properly and logically applied, the Baker Act is a legislative enactment and this Court has no authority by promulgation of a rule to supersede it. That is to say, this Court has no authority in law to authorize a trial judge to direct the Florida State Hospital and its administrator to retain under custodial care and treatment a person in the status of Petitioner Powell, who was found not guilty by a jury because of insanity and was duly placed in custody for

treatment in Florida State Hospital, and has now been determined by the Hospital administrator pursuant to authority of the Baker Act no longer insane and subject to discharge. If the Legislature decides this power should be given circuit judges, it may attempt to do it subject, of course, to constitutional limitations. This Court cannot do it by rule in the absence of due modification of the Baker Act.

Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-152

In re CHRISTINA I. CONNORS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES T. RUSSELL, State Attorney
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INDEX

CITATIONS

OBJECTIONS PRESENTED

1. Petitioner lacks sufficient standing to present this matter before the Court.

2. Petitioner has presented various issues which were not presented to the Supreme Court of Florida in the matter of *Christina I. Connors* 332 So. 2d 336 (Fla. 1976) and therefore those issues should not be considered by this Court.
   (a) The issue of equal protection relating to persons convicted and under sentence and persons with a criminal record.
   (b) Indefinite confinement of an acquittee by reason of insanity solely on the authority of a rule of criminal procedure, violating the U.S. Constitution's guarantee of due process of law under the Fourteenth Amendment or violating the U.S. Constitution's guarantee of a republican form of government under Article IV, Section 4.

3. F.R.Cr.P. 3.460 does not violate any of the provisions of due process and equal protection under the U.S. Constitution, and specifically under the Fourteenth Amendment.

4. F.R.Cr.P. 3.460 is a rule of procedure and not of substantive law.

5. The construction given to F.R.Cr.P. 3.460 by the Florida Supreme Court is binding upon federal courts.

STATEMENT OF CASE

Respondent accepts the statement of case elaborated upon in the Petition and would add thereto:

1. A hearing was held pursuant to F.R.Cr.P. 3.460 wherein the reports of the psychiatrists were stipulated to by the defense and all due process safeguards required were adhered to and the defense did not object to any of the procedures involved. Said hearing was separate and apart from the trial of defendant Christina I. Connors and the Department of Health and Rehabilitative Services was nowhere to be found at the said hearing.

2. No contempt citation was ever issued against any individual involved in the case of Christina I. Connors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-152

In re CHRISTINA I. CONNORS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Petitioner lacks sufficient standing to present this matter before the Court.

Petitioner in this case is the Florida Department of Health and Rehabilitative Services, as is stated in the petition on page 8, and as such cannot satisfy the burden placed upon it to establish standing pursuant to cases beginning with *Flast* v *Cohen* 392 U.S. 83 20 L Ed 2d 947. In *Flast* supra p. 102 there was a requirement that there must be a logical nexus between the status asserted and the claim sought to be adjudicated. This nexus is two-pronged. First there must be established a logical link between status and the type of legislative enactment attacked, and secondly there must be established a nexus between that status and the precise nature of the constitutional infringement alleged.

The Department of Health and Rehabilitative Services challenges F.R.Cr.P. 3.460 because it does not provide the individual with the due process and equal protection requirements of the U.S. Constitution. Nowhere is it alleged that the petitioner's status is at all connected with the constitutional infringements alluded to in the petition.

Petitioner does not allege any injury in fact, but merely that this rule deals unfairly with individuals who are committed to the Department under F.R.Cr.P. 3.460. This is not enough, for this Court has held that a party seeking review must himself be among the injured. *Sierra Club* v *Morton*, 405 U.S. 727, p. 734 31 L Ed 2d 636 (1972). The Department of Health and Rehabilitative Services is in a similar position to that of the Sierra Club. It is merely asserting that a law is unconstitutional without alleging any injury to the Department directly by F.R.Cr.P. 3.460.

An analogous situation occurs when a private citizen wishes to have an individual criminally prosecuted because that individual injured the private citizen. In a case such as that the logical nexus under *Flast* supra does not exist for the third party. The private citizen is in the same position as the Department of Health and Rehabilitative Services. As a result of the enforcement of F.R.Cr.P. 3.460, the Department of Health and Rehabilitative Services is not the one being directly injured. In *Linda R. S.* v *Richard A.* 410 U.S. 614 p. 619, 93 S.Ct. 1146, 35 L.Ed. 2d 536 p. 541, this Court held

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.

It has been said many times that the mere fact that a petition contains an allegation that a particular statute is unconstitutional does not in itself confer jurisdiction upon the Supreme Court, unless the legal rights of litigants are actually involved in

the controversy. Here the Department of Health and Rehabilitative Services is not involved in the controversy. F.R.Cr.P. 3.460 involves the commitment of an individual not directly associated with the Department. Being a State agency it must abide by the laws of the State and those laws of the State are interpreted by the State Supreme Court. Once that Supreme Court has settled the issue there no longer exists a controversy between State agencies, *Baker* v *Carr* 369 U.S., 186 and 82 S.Ct. 691 (1962).

Finally, this point is made in the dissent by Justice Hatchett *in re Connors* 332 So. 2d 336, (Fla. 1976 p. 346)

> . . . the majority loses sight of the particular case before us. Even though the trial court ruling applies specifically "to this defendant", and "other defendants in like circumstances" the majority makes no mention of the fact that neither Mrs. Connors nor any other criminal defendant is any longer a party to this cause. At no time has Mrs. Connors appealed from any order entered in the course of these proceedings. Dr. Cahoon was never adjudged in contempt, and the order to show cause directed to him was effectively dissolved by the order of December 20, 1974, which was entered of record three days later . . . . In no accepted sense, however, was the Division of Mental Health, itself an arm of the State government, a party defendant in Mrs. Connors' prosecution.

II. Petitioner has presented various issues which were not presented to the Supreme Court of Florida in the matter of *Christina I. Connors* supra, and, therefore, those issues should not be considered by this Court.

On page 3 of the Petition for Writ of Certiorari the issue of equal protection relating to persons convicted and under sentence and persons with a criminal record was not raised in any form by the petitioner in the lower court.

Petitioner's point 2 on page 4 of the petition:

> Does the indefinite confinement of an acquittee by reason of insanity, solely on the authority of a rule of criminal "procedure", violate the United States Constitution's guarantee to due process of "law" under the Fourteenth Amendment or violate the United States Constitution's guarantee of a republican form of government under Article IV, Section 4?

was not raised in the lower court in any manner, nor was it decided by the lower court.

This Court in *Street* v *New York*, 89 S.Ct 394, 1354 U.S. 576 (1969) held that the Court must consider whether or not a question was presented to the lower court in such a manner that it was necessarily decided by the lower court. If the question was not so presented the Court felt it could not consider it, p. 581-582. In addition, *Street* v *New York* supra held that whether or not the question was sufficient and properly raised in the state courts was itself a Federal question, p. 583. This principle has been restated many times: in *Fuller* v *Oregon*, 417 U.S. 40, 40 L. Ed 2d 642, 94 S.Ct. 2116 (1974); *Debacker* v *Brainard*, 396 U.S. 28, 90 S.Ct. 163 (1969); and *Monks* v *New Jersey*, 398 U.S. 71, 90 S.Ct. 1563 (1970).

The issues can therefore be narrowed by eliminating all reference to the comparison of Florida criminal rule of procedure 3.460 and the procedures used to confine persons convicted and under sentence and persons with criminal records.

As to Petitioner's second major contention that there is a violation of due process of law under the Fourteenth Amendment, the only such allegation presented to the State Supreme Court involving due process relates to petitioner's right to notice, a hearing, an opportunity to be heard, the right to counsel, the right to confront and cross examine witnesses, afford an opportunity to present evidence, grant periodic review, and the standards for commitment under the Baker Act versus the F.R.Cr.P. 3.460. Neither in the opinion *In re*

Christina I. Connors supra nor petitioner's brief to the lower court, is there any mention of Article V, Section 4 of the United States Constitution, nor any mention of a violation of our republican form of government.

III. F.R.Cr.P. 3.460 does not violate any of the provisions of due process and equal protection under the U.S. Constitution, specifically under the Fourteenth Amendment.

For the sake of orderly argument and to avoid a repetition respondent will combine both the due process and equal protection arguments presented by petitioner relying on the Fourteenth Amendment of the United States Constitution.

Petitioner initially argues the indefiniteness of the commitment of Christina Connors. Relying on the lack of specificity in the rule with regard to the availability of hearing for continued involuntary hospitalization, it is true that nowhere in the rule is it specified when a person committed under F.R.Cr.P. 3.460 shall have a right to periodic review, but such a specific requirement is not necessitated by the law as long as discretion is not abused.

In *Jackson* v *Indiana* 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed. 2d 435 (1972) petitioner argued that defendant's commitment was in essence a life sentence since it appeared that the defendant would never be competent to stand trial. The Court held that the commitment of Jackson was unconstitutional, but the reasons for this holding bear directly on the case before the court.

As in Florida, the Indiana Statute had no provision for periodic review. This in itself was not found to be defective. The Court compared 18 U.S.C. §4247 and §4248 to the Indiana Statute. What the Court found was a constitutional commitment procedure under the federal system providing for

the involuntary hospitalization of insane and mentally incompetent individuals who will probably endanger the safety of the officers, the property, or other interests of the United States. When one of the above conditions of commitment no longer applies, the individual is entitled to release. The key is the dangerousness of the individual. Under the Indiana Statute there was no requirement that the committed individual had to be dangerous, thereby creating the distinction which allowed the court to find the Indiana Statute unconstitutional. It should be noted that, as in Florida, 18 U.S.C. §4247 and §4248 does not contain specific hearing and notice requirements, but the Federal Statute is Constitutional because such provisions are inherent in the operation of any judicial procedure.

The Florida Supreme Court *In re Connors* supra p. 239 provided a standard for periodic reexamination by the State Courts under F.R.Cr.P. 3.460 setting up the limit for reexamination to be six months, and further provided that should the court not periodically reexamine and make a redetermination of a patient's *mental* condition that it would be appropriate to seek the available remedies under the laws of the State of Florida.

Therefore, indefinite confinement under the current State of Florida law is not possible, for once an individual is no longer dangerous or no longer insane he is to be released, *Jackson* v *Indiana* supra.

The next point raised by petitioner under the Fourteenth Amendment relates to a hearing prior to commitment and to the rights which accompany such a hearing. Respondent cannot argue with the various citations in the petition, for due process does require a hearing and those rights which accompany a hearing, *Morrissey* v *Brewer* 408 U.S. 471, 92 S.Ct. 2593 33 L.Ed 2d 484 (1972). In the case before the court the defendant was afforded a full hearing, was represented by counsel, was examined by competent psychiatrists, and the reports of the psychiatrists were stipulated to by the defense. Noticeably

lacking in petitioner's argument is any mention of a defense attorney objecting to the procedures of the trial court. Assumably the defense attorney found nothing objectionable about F.R.Cr.P. 3.460's application to his client. The Florida Supreme Court in *In re Connors*, supra and in *Powell* v *Genung*, 306 so. 2d 113 (Fla. 1974) held, in both instances, petitioner had a right to and received all Constitutional due process requisites. He was allowed to be confronted with the witnesses against him, to cross examine them, and to offer evidence of his own. The Florida Supreme Court therefore has spoken twice to the issue of due process and the hearing requirement and it is now a well established fact that in the State of Florida F.R.Cr.P. 3.460 provides all the Constitutional protections of due process pursuant to the Fourteenth Amendment of the United States Constitution.

The relation of equal protection to petitioner's argument falls mainly upon the burden of the civilly committed patient compared to the patient committed under F.R.Cr.P. 3.460. Petitioner maintains that F.R.Cr.P. 3.460 only requires a finding that the individual is manifestly dangerous, but not mentally ill. One need only read F.R.Cr.P. 3.460 to find that a person must be insane and dangerous. This position is further clarified in *In re Connors*, supra p. 328 where the Court clearly held that these provisions related to the individual strictly at the time of commitment and not to the time of the commission of the offense, and further *In re Connors* supra p. 339, when the Court refers to the reexamination and redetermination, it speaks of the individual's *mental* condition and should petitioner feel that insanity is not sufficient for mental illness one need only look to 18 U.S.C. §4247, or to the voluminous case law on the subject of insanity as an affirmative defense, cited in part in the petition.

Respondent concedes that Chapter 394 Florida Statutes and F.R.Cr.P. 3.460 are not word-for-word identical, but the burden

they put forth is equivalent. The compelling interest doctrine only applies when the burden is substantially unequal and not just where there is a minor difference in application or wording, *Williams* v *Rhodes* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968); *Sayler Land Company* v *Tulare Lake Basin Water Storage District* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed. 2d 659 (1973).

Petitioner speaks of prehearing custody, yet nowhere is prehearing custody mentioned in F.R.Cr.P. 3.460 nor *In re Connors* supra nor *Powell* v *Genung* supra, nor in petitioner's brief to the Florida Supreme Court. The issue does not exist, nor is it in conflict. The courts of Florida have held that to be committed under F.R.Cr.P. 3.460 requires a hearing with all the due process requirements which have heretofore been stated.

On page 19 of the petition it is stated that the rule as applied does not guarantee the acquittee minimum due process standards applicable to the states under the Fourteenth Amendment, yet nowhere in the petition is the actual application by the Florida trial courts to defendants ever discussed.

IV. F.R.Cr.P. 3.460 is a rule of procedure and not of substantive law.

The Florida Legislature in Section 394.467(5)(a) Florida Statutes:

> In the case of any patient who has been committed to a mental hospital pursuant to F.R.Cr.P. 3.460 (acquittal for a cause of insanity), Florida Rules of Criminal Procedure, committing court shall retain jurisdiction in the case.

The Florida Legislature has recognized that the courts of Florida retain jurisdiction over certain individuals and has given that jurisdiction to the courts, the conclusion here being that F.R.Cr.P. 3.460 should be the vehicle used by the courts to

commit defendants found not guilty by reason of insanity. Therefore in Florida the question as to whether or not the Legislature has the authority for commitment or whether or not the courts of Florida have the inherent right to enact a procedural rule for such commitment does not present a problem, for the Legislature has recognized the courts' authority and the courts have recognized their own authority in this area.

V. The construction given to a State Statute by the State Courts is binding upon the Federal Courts.

Respondent, during the course of this brief, has periodically relied upon the interpretations given to F.R.Cr.P. 3.460 by the Supreme Court of the State of Florida *In re Connors* supra *Powell* v *Genung* supra. The Supreme Court has stated many times that the

> Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon the federal courts.

Albertson v *Millard*, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 98 p. 985 (1953). *United States* v *Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1950) deals with a California Statute interpreted by the California Supreme Court prior to being contested on Federal Constitutional grounds. The Supreme Court stated

> The construction of a California Code by the California Supreme Court is, of course, binding on us. (p. 89).

The provision which the California Supreme Court interpreted dealt with a testamentary gift to the United States Government. Had the California Supreme Court not interpreted the California Probate Code as restricting such gifts to the United States Government there would have been no appeal. For the point of appeal was

> . . . that the California Code, as interpreted, violates the Supremacy Clause of the Constitution, in that it infringes upon the "inherent sovereign power" of the United States to receive testamentary gifts. (p. 90)

In *Kingsley International Picture Corp.* v *Regents of the University of the State of New York*, 360 U.S. 684, 79 S.Ct. 1362 (1959) the Supreme Court was bound to follow the construction which was given a state statute by the highest court in New York.

> We accept, too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. (p. 688)

In other decisions, words which on their face may be vague or broad have been defined by the state courts to such an extent that the definition has been sufficient to overcome constitutional attack, *Mishkin* v *State of New York* 383 U.S. 502, 86 S.Ct. 958, p. 962 (1966).

The above is a brief recital of a portion of the case law which allows this Court to use the interpretations placed upon a statute or, in this case a rule by the state courts, as a basis for a decision to determine the constitutional validity of said statute or rule.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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APPENDIX

§4246. Procedure upon finding of mental incompetency.

Whenever the trial court shall determine in accordance with section 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided. (added Sept. 7, 1949, ch. 535 § 1, 63 Stat. 686.)

§4247. Alternate procedure on expiration of sentence.

Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, hold a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissable in evidence. All of the psychiatrists and members of the board who have examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examination by the prisoner or on behalf of the Government. At such hearing the court may in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative. (added Sept. 7, 1949, ch. 535, § 1, 63 St. 686.)